Filed 11/21/16 Asatrian v. Ralphs Grocery Co. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

VARTOHUI ASATRIAN, Plaintiff and Appellant, v. RALPHS GROCERY COMPANY, Defendant and Respondent.	B267172 (Los Angeles County Super. Ct. No. BC538657)

APPEAL from an order of the Superior Court of Los Angeles County, Teresa A. Beaudet, Judge. Affirmed.

Law Offices of Siamak Vaziri, Siamak Vaziri and Mark J. Giannamore for Plaintiff and Appellant.

Stone | Dean, Gregory E. Stone and Gregory S. Miller for Defendant and Respondent.

After falling in a Ralphs Grocery Store, Vartouhi Asatrian (Asatrian) filed suit against Hughes Markets, Inc. dba Ralphs (Ralphs), alleging premises liability and negligence. Ralphs moved for summary judgment and the trial court granted the motion on July 22, 2015. Asatrian filed a timely appeal, and we affirm.

BACKGROUND

On April 9, 2012, Asatrian slipped and fell while exiting a Ralphs store located at 14440 Burbank Boulevard in Sherman Oaks. Asatrian filed a complaint against Ralphs on March 7, 2014, alleging premises liability and negligence because the floor was uneven and defective. Ralphs answered and, in due course, moved for summary judgment on the ground the floor defect was trivial as a matter of law. In support of its motion, Ralphs submitted a declaration by the store's former co-manager, Vicente Vides (Vides), who inspected, measured, and photographed the floor.

Asatrian supported her opposition with her own declaration and a declaration by Brad P. Avrit (Avrit), a civil engineer expert. Ralphs filed a reply. The trial court heard oral argument on July 22, 2015, and filed an order that same day, concluding that "the alleged defect which caused Asatrian's injuries is trivial as a matter of law, thus Ralph is not liable for damages that may have been caused by the defect." Judgment was entered on September 2, 2015. Asatrian filed a timely notice of appeal.

DISCUSSION

Ralphs contends it cannot be liable because, as a matter of law, there was no condition creating a substantial risk of injury. The irregularity in the floor was a trivial defect. We agree.

"Because plaintiff[ ] appealed from the trial court's order granting defendants summary judgment, we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) In performing our de novo review, we employ a three-step analysis: " 'First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, *if the movant has met its burden*, we consider whether the opposition raised triable issues of fact.' [Citations.] To shift the burden, the defendant must conclusively negate a necessary element of the plaintiff's case or demonstrate there is no triable issue of material fact requiring a trial. [Citation.] If the evidence does not support judgment in defendant's favor, we must reverse summary judgment without considering the plaintiff's opposing evidence." (*Barber v. Chang* (2007) 151 Cal.App.4th 1456, 1462–1463.) Finally, summary judgment is a drastic remedy. Thus any doubts about the propriety of summary judgment must be resolved in favor of the party opposing the motion.

(*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 900.)

The trivial defect defense

Here, Ralphs sought summary judgment on the ground that it owed no duty to Asatrian because the defect in the floor was trivial as a matter of law. It is well established that a property owner is not liable for damages caused by a minor, trivial or insignificant defect in property. (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927 (*Caloroso*).) Some defects are bound to exist even in the exercise of reasonable care in the maintenance of property and cannot reasonably be expected to cause accidents. (*Johnson v City of Palo Alto* (1962) 199 Cal.App.2d 148 (*Johnson*).) Courts have referred to this simple principle as the " 'trivial defect' defense," although it is not an affirmative defense but rather an aspect of duty that plaintiff must plead and prove. (*Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 398–399 (*Ursino*).) The trivial defect doctrine originated to shield public entities from liability where such minor risks existed; however, the doctrine has been expanded on multiple occasions to embrace actions against private nongovernmental landlords. (*Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 27; *Caloroso,* at p. 927.) As the *Ursino* court stated, "persons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition." (*Ursino,* at p. 398.) "Moreover, what constitutes a minor defect may be a question of law." (*Cadam v.*

Somerset Gardens Townhouse HOA (2011) 200 Cal.App.4th. 383, 388–389.) Whether the defect is minor or substantial as a matter of law involves several incremental inquiries. "First, the court reviews evidence regarding the type and size of the defect. If that preliminary analysis reveals a trivial defect, the court considers evidence of any additional factors such as the weather, lighting and visibility conditions at the time of the accident, the existence of debris or obstructions, and plaintiff's knowledge of the area. If these additional factors do not indicate the defect was sufficiently dangerous to a reasonably careful person, the court should deem the defect trivial as a matter of law and grant judgment for the landowner." (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 567–568.)

Vides' declaration states: "the defect or irregularity in the surface of the linoleum tile had a maximum height of less than 1/8 of an inch when compared with the adjacent surface, and had no jagged edges, broken pieces, or exposed rebar." This statement is supported by photographs of the alleged defect, presented by Ralphs as exhibits D1 to D4. Although Asatrian disputed this contention in her response to the facts stated by Ralphs, she failed to offer any contradictory facts or evidence to counter the material fact that the irregularity in the surface was indeed no higher than one-eighth of an inch. Instead, she relied on Vides' July 6, 2015 deposition, wherein he described the cracks and wear in the floor as approximately 3.5 inches by 3.5 inches in width and in length. The bottom line, however, is that any

cracks or imperfections in the tile floor do not change the height or nature of the defect. Further, there is no evidence the cracks in any way contributed to the fall.

Multiple courts have held that sidewalk or floor defects substantially greater than one-eighth of an inch were trivial as a matter of law. (See *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 724 [defects ranging from three-fourths to one and a half inches in height trivial as a matter of law].) Importantly, no published cases have held that a defect one-eighth of an inch in height created a dangerous condition. The cited case law, bolstered by common sense, leads to the conclusion that such a minor elevation difference cannot be construed as a considerable deviation in a floor. Thus, unless there is disputed evidence that other conditions made the floor dangerous, the alleged defect in this case must also be deemed trivial as a matter of law. (*Caloroso, supra*, 122 Cal.App.4th at p. 927.)

Asatrian alleged no aggravated conditions which might suggest a greater danger. To the contrary, in her deposition, Asatrian admitted there was no liquid, water, trash, or other foreign substance in the area at the time of her fall. Therefore, Asatrian's reliance on *Johnson*, *supra*, 199 Cal.App.2d 148 and *Rodriguez v. City of Los Angeles* (1963) 215 Cal.App.2d 463 is misplaced. In *Johnson*, evidence of poor lighting (the plaintiff in *Johnson* tripped over a sidewalk crack at 9:30 p.m.), in combination with other circumstances, was found sufficient to defeat the city's motion for summary judgment. (*Johnson*, at pp. 150, 152.)

Here, as shown in a video footage from the store's security camera, the fall occurred in an area well illuminated by a combination of daylight and electric light. Furthermore, as explained by Vides and corroborated by the video, there was no debris, grease, or water on the floor at the time of the incident, nor were there any obstructions concealing a dangerous condition. In contrast, *Rodriguez* addressed a fact scenario where at least four accidents had previously occurred at the precise location where the plaintiff tripped and fell, and the city had notice of the defective condition. (*Rodriguez*, at p. 468.) Ralphs presented undisputed evidence that there were no other customer accident claims involving the same or similar defect, and no evidence of prior notice.

The declaration of Avrit.

Ralphs met its burden to show that the defect was trivial as a matter of law, shifting the burden to Asatrian to raise triable issues of fact. In her efforts to contradict Ralphs' evidence and raise a triable issue of fact, Asatrian relies heavily on the expert declaration of Avrit, which Asatrian filed in support of the opposition to Ralphs' summary judgment motion. " '[E]xpert opinions . . . are worth no more than the reasons and factual data upon which they are based.' " (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607.) An expert opinion unsupported by reason or explanation does not establish the absence or presence of a material fact issue for trial for the purposes of summary judgment. (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524.)

This is especially true here. Avrit's declaration states simply that "[a] substantial defect exited in the vinyl floor tile at the time of the incident and constituted an unsafe condition." Avrit did not dispute the size, height, or width of the alleged defect; in fact, he admitted he had not been able to measure the defect. Further, as noted in *Caloroso, supra,* 122 Cal.App.4th at page 928, and as stated by the trial court, "[e]xpert testimony is not required where the subject matter is one of a common experience, and when photographic evidence of the alleged defect is sufficient to show that the defect was trivial."

The court correctly sustained Ralphs' objection to Avrit's testimony that high foot traffic exacerbated the defective condition, because there was no foundation for his speculation regarding the volume of traffic. Further, the court also properly found that there was no foundation for Avrit's conclusion that "the subject area constituted a safety hazard" due to Ralphs' possible noncompliance with section 8104.6 of the Los Angeles building code. Additionally, there is no legal or factual foundation for a conclusion that a possible violation of such codes is the standard for determining the triviality of a defect, as presented in the cited case law. In *Caloroso, supra,* 122 Cal.App.4th at page 922, where Avrit also submitted a declaration on behalf of the plaintiff, the court excluded Avrit's testimony after rejecting contentions similar to those he asserted in this case: "The court properly found no foundation for Avrit's opinion that noncompliance with

certain building codes and standards made the crack dangerous. Avrit failed to indicate that these codes and standards have been accepted as the proper standard in California for safe sidewalks." (*Id.* at p. 928.)

Where reasonable minds can reach only one conclusion—that there was no substantial risk of injury—the issue is a question of law, properly resolved by way of summary judgment. (*Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 704.) We have independently reviewed the evidence: we agree that reasonable minds could not differ regarding whether the risk of injury was trivial. Ralphs has met its burden to show that Asatrian could not prevail on her complaint and Asatrian has failed to raise any triable issue of fact in opposition. The trial court properly granted summary judgment.

DISPOSITION

The order is affirmed. Ralphs Grocery Company is awarded costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J. CHANEY, J.